

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

CRIMINAL ACTION NO. 2:19-cr-00162

KEVIN LEE BOSTON, II

MEMORANDUM OPINION AND ORDER

Pending before the court is Defendant Kevin Lee Boston's Second Renewed Motion for Compassionate Release. [ECF No. 48]. The court in deciding such motions will consider the following: whether the defendant has exhausted his administrative remedies, has demonstrated "extraordinary and compelling reasons," and the § 3553(a) factors. In deciding what constitutes "extraordinary and compelling reasons" for release by reason of COVID-19, a defendant must demonstrate that he has a medical condition listed by the Centers for Disease Control and Prevention as causing an increased risk of severe illness from COVID-19 and that he is at a facility which cannot effectively prevent the spread of the virus.

I. Background

On December 9, 2019, I sentenced Mr. Boston to 24 months of imprisonment followed by 5 years of supervised release after Mr. Boston pleaded guilty to being part of a conspiracy to travel to engage in illicit sexual conduct. [ECF No. 35]. Mr. Boston previously requested compassionate release. [ECF No. 41]. I denied that request for a failure to exhaust administrative remedies. [ECF No. 42]. Mr. Boston then re-filed his Motion for Compassionate Release along with a Motion for Appointment of

Counsel, including evidence of exhaustion. [ECF Nos. 43, 44]. I denied those Motions for a failure to demonstrate extraordinary and compelling reasons justifying his release. [ECF No. 45]. Mr. Boston then filed a Renewed Motion for Compassionate Release. [ECF No. 46]. I denied that Motion for a failure to re-exhaust his administrative remedies. [ECF No. 47]. Mr. Boston re-filed that Renewed Motion for Compassionate Release, including evidence of exhaustion, on December 23, 2020. [ECF No. 48]. I consider that Renewed Motion now.

Mr. Boston is currently imprisoned at Federal Correctional Institution Elkton in Lisbon, Ohio. According to the record, he has a history of type 2 diabetes, hyperlipidemia, and hypertension. [ECF No. 44, at 2]. FCI Elkton is a low-security federal correctional institution that currently houses 1,418 total inmates. *FCI Elkton*, Fed. Bureau of Prisons, <https://www.bop.gov/locations/institutions/dan/> (last visited Jan. 6, 2021). As of January 6, 2021, there are three active cases of COVID-19 among prisoners and 22 active cases among staff at FCI Elkton. *See COVID-19 Cases*, Fed. Bureau of Prisons, <https://www.bop.gov/coronavirus> (last visited Jan. 6, 2020). Mr. Boston has an estimated release date of August 30, 2021. *Find an Inmate*, Fed Bureau of Prisons, <https://www.bop.gov/inmateloc/> (last visited Jan. 6, 2021).

II. Discussion

The First Step Act “embodies Congress’s intent to reduce the Bureau of Prison’s authority over compassionate release petitions and authorizes the district courts to exercise their independent discretion to determine whether there are ‘extraordinary and compelling reasons’ to reduce a sentence.” *United States v. Galloway*, No. CR RDB-10-0775, 2020 WL 2571172, at *3 (D. Md. May 21, 2020) (internal citations removed); *see also United States v. Stephenson*, No. 3:05-CR-

00511, 2020 WL 2566760, at *5 (S.D. Iowa May 21, 2020) (“Unqualified deference to the BOP no longer makes sense now that the First Step Act has reduced the BOP’s role.”).

For me to reduce Mr. Boston’s sentence under compassionate release, I must find that Mr. Boston has exhausted his administrative remedies, has demonstrated “extraordinary and compelling reasons, and find that his release is consistent with the § 3553(a) factors. *See e.g., United States v. Howard*, No. 4:15-CR-00018-BR, 2020 WL 2200855, at *2 (E.D.N.C. May 6, 2020); U.S.S.G. § 1B1.13 (2018). As I will explain, to find “extraordinary and compelling reasons” exist by reason of COVID-19, Mr. Boston must demonstrate that he has a medical condition listed by the Centers for Disease Control and Prevention (“CDC”) as causing an increased risk of severe illness from COVID-19 and that he is at a facility which cannot effectively prevent the spread of the virus.

a) Exhaustion of Administrative Remedies and Section 3582(c)(1)(A)

The First Step Act empowers criminal defendants to request compassionate release for “extraordinary and compelling reasons.” 18 U.S.C. § 3582(c)(1)(A)(i). But before they make such requests, defendants must ask BOP to do so on their behalf and then wait 30 days. *See* § 3582(c)(1)(A). Upon such a motion from BOP or from a defendant (after BOP denies the request or thirty days have elapsed since the request was filed), a court “may reduce the term of imprisonment” 18 U.S.C. § 3582(c)(1)(A)(i); *see also United States v. McCoy*, 981 F.3d 271, 283 (4th Cir. 2020).

Mr. Boston writes that he requested compassionate release from the warden at FCI Elkton on November 18, 2020. [ECF No. 48, at 7]. The response to that request is not included with Mr. Boston’s filing. Nevertheless, because more than thirty days

have passed since Mr. Boston sent his renewed request to the warden, I find that Mr. Boston has exhausted his administrative remedies. As such, I now turn to whether he has alleged extraordinary and compelling reasons that would justify compassionate release.

b) Extraordinary and Compelling Reasons

Once an inmate has satisfied administrative exhaustion, courts may reduce his upon a finding of “extraordinary and compelling reasons.” *See* 18 U.S.C. § 3582(c)(1)(A).

There are “disagreements [among district courts] about the precise definition of ‘extraordinary and compelling reasons’ justifying compassionate release.”¹ *United States v. Cotinola*, No. 13-CR-03890-MV, 2020 WL 2526717, at *3 (D.N.M. May 18, 2020). But the United States Court of Appeals for the Fourth Circuit has clarified that district courts are not bound by the enumerated extraordinary and compelling reasons listed in Guidelines § 1B1.13 because the Guidelines have not been updated since the passage of the First Step Act. *McCoy*, 981 F.3d at 284 (“As of now, there is no Sentencing Commission policy statement ‘applicable’ to the defendants’ compassionate-release motions, which means the district court need not conform . . . to § 1B1.13 in determining whether there exist ‘extraordinary and compelling

¹ The specific extraordinary and compelling reasons listed in the Sentencing Guidelines for BOP to consider include i) the defendant is suffering from a terminal or serious medical condition; ii) age of defendant; iii) family circumstances of defendant; and iv) “other reasons.” U.S.S.G. § 1B1.13; *United States v. Bass*, No. 1:10-CR-166 (LEK), 2020 WL 2831851, at *3–4 (N.D.N.Y. May 27, 2020). “Following the passage of the First Step Act, courts may independently determine whether such ‘other reasons’ are present in a given case, without deference to the determination made by the BOP.” *United States of America v. Thaher*, No. 17 CR. 302-3 (KPF), 2020 WL 3051334, at *4 (S.D.N.Y. June 8, 2020).

reasons’ for a sentence reduction.”). “District Courts are ‘empowered . . . to consider *any* extraordinary and compelling reason for release that a defendant might raise.” *McCoy*, 981 F.3d at 284 (quoting *United States v. Zullo*, 976 F.3d 228, 230 (2d Cir. 2020)).

Many courts have found “extraordinary and compelling” reasons “supporting release on the basis of a combination of dire prison conditions and underlying health conditions that increase the likelihood of severe illness from COVID-19.” *See e.g.*, *Bass*, 2020 WL 2831851, at *7 (citing *e.g.*, *Rodriguez*, 2020 WL 1627331, at *9 (finding an “extraordinary and compelling reason” on the basis of the inmate’s diabetes, high blood pressure, and liver abnormalities, the outbreak at FCI Elkton, and the short period remaining on his sentence); *United States v. Sawicz*, No. 08-CR-287 (ARR), 2020 WL 1815851, at *2 (E.D.N.Y. Apr. 10, 2020) (finding an “extraordinary and compelling reason” on the basis of the inmate’s hypertension and conditions at FCI Danbury). I previously granted compassionate release to a defendant who was immunocompromised—suffering from a liver disease, Hepatitis C. *See United States v. White*, No. 2:17-CR-00198-4, 2020 WL 3244122, at *6 (S.D. W. Va. June 12, 2020); *see also Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Jan. 6, 2021) (listing “immunocompromised state” as an underlying medical condition causing an “increased risk for severe illness from COVID-19”).

In addition, many courts rely upon CDC guidance for whether a medical condition constitutes an “extraordinary and compelling” reason for release. *See e.g.*, *United States v. Salvagno*, No. 5:02-CR-51 (LEK), 2020 WL 3410601, at *4 (N.D.N.Y.

Apr. 23, 2020), reconsideration denied (June 22, 2020) (“The Centers for Disease Control and Prevention has advised that people with hypertension face an increased risk of severe illness from COVID-19.”); *United States v. Nygren*, No. 1:16-CR-00106-JAW, 2020 WL 4208926, at *12 (D. Me. July 22, 2020) (“Based on the medical records in this case and the CDC guidance”); *United States v. Bell*, No. 18-CR-60115-BB-4, 2020 WL 4217724, at *4 (S.D. Fla. July 23, 2020) (“CDC guidance indicates that individuals with the following health conditions are at a higher risk of contracting severe illness due to COVID-19”). And many courts reject compassionate release petitions when the defendant does not suffer from any conditions recognized by CDC as causing an increased risk of severe illness from COVID-19. *See e.g., United States v. Adeyemi*, No. CR 06-124, 2020 WL 3642478, at *19 (E.D. Pa. July 6, 2020) (“Mr. Adeyemi’s asthma does not currently fit the Centers for Disease Control and Prevention’s high-risk category.”); *United States v. Mollica*, No. 2:14-CR-329-KOB, 2020 WL 2811504, at *3 (N.D. Ala. May 29, 2020) (“Ms. Mollica is under 65 and the CDC has not listed the underlying conditions from which she suffers as creating particular risk for COVID-19.”); *United States v. Arroyo*, No. 2:19-CR-54-1-TLS-JPK, 2020 WL 3118787, at *4 (N.D. Ind. June 12, 2020) (“High cholesterol is not listed on the CDC website as a risk factor related to COVID-19”); *United States v. Cosby*, No. 18CR4474-JAH, 2020 WL 3840567, at *4 (S.D. Cal. July 7, 2020) (“CDC has not listed epileptic seizures as a condition that places individuals at a higher risk of severe illness.”); *United States v. Frazer*, No. CR 19-110, 2020 WL 2404893, at *2 (E.D. Pa. May 12, 2020) (“Sleep apnea is not listed by the CDC as a serious underlying medical condition that could increase a person’s risk for severe illness from COVID-19.”).

I join other courts in holding that I cannot find that “extraordinary and compelling” reasons exist to grant release because of COVID-19 unless the inmate has a condition that makes him more at risk for developing a serious illness from COVID-19 *and* the facility where the inmate is housed has conditions such that its inmates are at a high risk of contracting COVID-19. *See United States v. Raia*, 954 F.3d 594, 594 (3d Cir. 2020) (“But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release”); *United States v. Penaloza*, No. 19-238, 2020 WL 1555064, at *2 (D. Md. Apr. 1, 2020) (“[T]he mere presence of the virus, even in the detention setting, does not translate to the release of a person accused.”).

In deciding which conditions result in an inmate being a higher risk for COVID-19, I will defer to CDC’s list of medical conditions causing an increased risk of severe illness from COVID-19. *See Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Jan. 6, 2021). Using CDC guidance will allow for more predictable standards in deciding which defendants have “extraordinary and compelling” reasons justifying release.

If an inmate can demonstrate that he or she has a condition identified by CDC, next, the defendant must show that his or her prison conditions are such that BOP cannot effectively prevent the spread of COVID-19. Factors include but are not limited to the steps BOP has taken to stop the spread of COVID-19 in that particular prison and steps to follow CDC guidance, the ability of inmates to socially distance, the amount of hygiene products and face masks provided to inmates, and the number of COVID-19 cases in that prison.

I will note that former Attorney General William Barr twice issued memoranda directing BOP to prioritize the use of home confinement for vulnerable inmates. *See Memorandum for Director of BOP*, https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (last visited Sept. 13, 2020) and <https://www.justice.gov/file/1262731/download> (last visited Sept. 13, 2020). Yet, by all accounts, BOP has resisted calls to release vulnerable inmates to home confinement. Indeed, other district courts have noted their awareness “of the growing evidence of the BOP’s chronic mismanagement of its vulnerable population during the COVID-19 pandemic.” *Woodard v. United States*, No. 2:12-CR-105, 2020 WL 3528413, at *3 (E.D. Va. June 26, 2020); *see also Wilson v. Williams*, 4:20-cv-00794, 2020 WL 2542131, at *1–2 (N.D. Ohio May 19, 2020) (documenting the “unacceptable” percentage of positive tests at FCI Elkton and BOP’s “ineffective[ness] . . . at stopping the spread”). “Even in the best run prisons, officials might find it difficult if not impossible to follow the CDC’s guidelines for preventing the spread of the virus among inmates and staff: practicing fastidious hygiene and keeping a distance of at least six feet from others.” *United States v. Esparza*, No. 1:07-CR-00294-BLW, 2020 WL 1696084, at *2 (D. Idaho Apr. 7, 2020) (the likelihood of contracting the virus is greater in prison than if a defendant were able to fully self-isolated at home); *see also United States v. Stephens*, 447 F. Supp. 3d 63, 65, (S.D.N.Y. Mar. 19, 2020) (discussing the heightened risk presented by a COVID-19 outbreak in a jail or prison versus the community at large). Thus, when looking at whether an inmate is at a prison with a high risk of contracting COVID-19, it is also imperative to recognize the context and failures of BOP to stop the spread of COVID-19 in prisons.

Mr. Boston has alleged three health conditions: type 2 diabetes, hyperlipidemia, and hypertension. Type 2 diabetes is on the CDC's list of conditions that put a person at an increased risk of severe illness from the virus that causes COVID-19. Hypertension is on the list of conditions that may put a person at an increased risk of severe illness from the virus that causes COVID-19. Because Mr. Boston suffers from two conditions on the CDC list, I need not decide whether hyperlipidemia puts him at an increased risk for serious complications should he contract COVID-19. Having found that he does suffer from health conditions on the CDC list, I turn to whether he has alleged conditions at FCI Elkton that put him at a higher risk for contracting COVID-19.

Mr. Boston does not allege any specific conditions at FCI Elkton that put him at higher risk for contracting COVID-19. He includes descriptions of incidents from July 2020 about a failure to adequately isolate COVID-19-positive inmates and notes that he believes there is a failure to adequately train BOP staff in the use of PPE to prevent the spread of COVID-19. [ECF No. 48, at 45]. But he supplies nothing more than his allegation that this training does not exist. He does raise that FCI Elkton experienced a high number of cases of COVID-19 over the summer and that 9 prisoners have died from the disease at FCI Elkton. But FCI Elkton only has 3 active cases among prisoners at the moment.

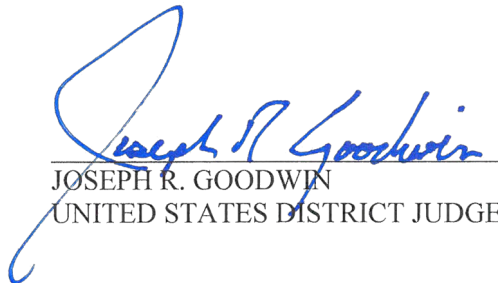
Without a discussion of conditions that put him at a higher risk for contracting COVID-19 than other prisoners, I cannot find that Mr. Boston has provided extraordinary and compelling reasons that warrant compassionate release. Despite Mr. Boston's argument that COVID-19 is hard to contain and manage in a prison setting, the First Step Act calls for an assessment of Mr. Boston's conditions, not an

assessment of prisons generally. While Mr. Boston's fears that he may contract COVID-19 are understandable, fears alone do not rise to the level of extraordinary and compelling reasons.

III. Conclusion

For the foregoing reasons, Defendant's motion for compassionate release [ECF No. 48] is **DENIED without prejudice**. The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal.

ENTER: January 7, 2021



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE